

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff

-and -

VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICATIONS INC., WEST FACE CAPITAL INC. and MID-BOWLINE GROUP CORP.

Defendants

**COSTS SUBMISSIONS OF VIMPELCOM LTD.
(MOTION TO DISMISS)**

PART I - OVERVIEW

1. VimpelCom Ltd. (**VimpelCom**) was wholly successful in dismissing the \$1.3 billion claim by Catalyst Capital Group Inc. (**Catalyst**) as an abuse of process. VimpelCom seeks its substantial indemnity costs of both the motion and the action.
2. VimpelCom – the named first defendant - was the focal point of this newest action: VimpelCom was at the centre of the impugned negotiations for the purchase of WIND that give rise to these proceedings.
3. The allegations surrounding the purchase of WIND had already been adjudicated without VimpelCom's participation in prior proceedings. This action is the latest installment of a campaign of serial litigation by Catalyst that has included the Mid-Bowline plan of arrangement

proceedings and the Moyse Action.¹ The evidentiary record that was thrust upon VimpelCom was vast.

4. Moreover, VimpelCom had to undertake its own diligence of Catalyst's claim: interviewing witnesses and collecting and reviewing documents. Given the significant stakes, VimpelCom did not — and could not be expected to — spare any effort or expense to fully defend itself.

PART II - BACKGROUND FACTS

5. Catalyst commenced this action on May 31, 2016, ultimately seeking \$1.3 billion in damages from VimpelCom and others.

6. VimpelCom, a leading global telecommunications company, took the steps necessary to defend the proceeding in a manner proportionate to the significant claim it faced, including:

- (a) collecting and reviewing thousands of documents from the relevant time period;
- (b) conducting interviews, which required travel outside of Canada, of numerous witnesses to the impugned negotiations with Catalyst and the subsequent successful transaction with the Consortium;
- (c) reviewing the entirety of the record of the Moyse Action and the Mid-Bowline plan of arrangement proceedings, including trial affidavits and cross-examination transcripts from ten individuals; and
- (d) drafting its Statement of Defence.

¹ *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271 (Tab 1), aff'd 2018 ONCA 283 (the Moyse Action) (Tab 2); *Re Mid-Bowline Group Corp.*, 2016 ONSC 669 (the Mid-Bowline plan of arrangement) (Tab 3).

7. In addition, VimpelCom prepared for the motion to dismiss Catalyst's action:
- (a) it prepared motion materials which incorporated 19 volumes of motion record, numbering more than 8000 pages;
 - (b) it reviewed and considered the hundreds of pages of materials filed by Catalyst;
and
 - (c) it attended cross-examinations, numerous case conferences, and four days of hearings of the motion in August 2017 and April 2018.
8. VimpelCom seeks its substantial indemnity costs of \$639,847.35 and disbursements of \$24,126.74 (along with applicable taxes) as shown in its Bill of Costs at Schedule "A".
9. VimpelCom recognizes that its costs claim is substantial and likely higher than the amounts claimed by its co-defendants. These higher costs reflect the fact that: (a) VimpelCom was new to the ongoing litigation and had not previously taken the steps to gather documents and interview witnesses; (b) Catalyst's allegations focused on the conduct of VimpelCom and VimpelCom's motivation; and, (c) Catalyst's action was an abusive proceeding that sought to re-litigate issues that had already been considered and dismissed by this court.

PART III - ISSUES AND LAW

10. The case law is clear that where a moving party is successful on a motion to dismiss, it is entitled not only to its costs in bringing a motion but it is also entitled to costs incurred in defending the underlying action.² Accordingly, VimpelCom seeks both its costs on the motion to dismiss and its costs in defending Catalyst's action.

² See. e.g. *Daniels v. Crosfield Canada Inc.*, (1994) 19 O.R. (3d) 430, 28 C.P.C. (3d) 1 (Gen. Div.) (Tab 4).

11. Section 131(1) of the *Courts of Justice Act* affords the court wide discretion in fixing costs:

131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

12. Costs awards are to reflect the court's own assessment of what is reasonable in a given proceeding.³ In exercising their discretion, courts are to award costs that are fair and reasonable in the circumstances and in consideration of the factors laid out in Rule 57.01(1) of the *Rules of Civil Procedure*.⁴ Each of these factors clearly supports VimpelCom's position.

Rule 57.01(0.a) – the principles of indemnity

13. VimpelCom was successful in dismissing Catalyst's action as an abuse of process.

14. While one of VimpelCom's arguments was not accepted on the motion - that Catalyst's claim was released by the Mid-Bowline plan of arrangement - success was not divided. A party who is substantially successful is entitled to its costs, even if it is unsuccessful on one or more ancillary issues.⁵

15. VimpelCom is seeking approximately 80% of the actual costs it incurred in this matter. Its costs are based on the standard hourly rates of Norton Rose Fulbright Canada LLP.

16. The litigation team was small and included a senior partner, a junior partner, an associate, and a law clerk. Most the work was done by the associate.

³ See *Boucher v. Public Accountants Council for the Province of Ontario (2002)*, 166 O.A.C. 281 (Div. Ct) (Tab 5).

⁴ See e.g. *Boucher, supra* at para 52 (Div. Ct.), aff'd [2004] O.J. No. 2634 at para 15 (C.A.) [Boucher] (Tab 5); *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495 (C.A.) (Tab 6); *Moon v. Sher*, [2004] O.J. No. 4651 (C.A.) (Tab 7).

⁵ *Toronto and Region Conservation Authority v. Gadzala*, [2006] OJ No 3188, at paras 28-30 (Tab 8); *Bergmann v Amis Estate*, 2010 ONSC 962, at para 16 (Tab 9).

Rule 57.01(0.b) – the reasonable expectations of Catalyst

17. Catalyst is a seasoned litigant that ought to have expected cost indemnification in the millions of dollars given the litigation involved high stakes and complex issues.⁶

18. In the Moyse Action, Justice Newbould ordered Catalyst to pay costs of \$1,053,232.77 to one defendant for litigating a six-day trial on these issues. On the appeal of the Moyse Action, the Court of Appeal for Ontario upheld the trial judge’s decision and his cost award and further ordered another large cost award against Catalyst – \$300,000 – for arguing a one-day appeal.

19. In making that award, Justice Newbould remarked that Catalyst was “playing hardball” and “utterly failed”.⁷ These comments apply equally to this motion and Catalyst reasonably should have expected a similar costs award for four days of motion time on the very same extensive record.

Rule 57.01(a) – the amount claimed

20. Catalyst had originally sought damages of \$750 million but chose to amend its claim to \$1.3 billion. By any measure, Catalyst was engaged in high stakes litigation against a global telecommunications company.

21. The costs being sought by VimpelCom represent 0.06% of the amount claimed against it by Catalyst.

Rule 57.01(c) – complexity of the proceedings

22. It is also beyond dispute that both the motion and underlying action were factually and legally complex.

⁶ *Fairview Donut Inc v the TDL Group Corp*, 2014 ONSC 776, at para 11 (Tab 10).

⁷ *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 6285, at para 10 (Tab 11).

23. The issues raised by Catalyst centred on the complex negotiations between VimpelCom and various bidders, the legal constraints binding the parties, and communications with the Government of Canada. VimpelCom conducted a thorough investigation of the issues raised in the action, met with numerous witnesses, and reviewed thousands of documents.

24. VimpelCom's challenge in defending Catalyst's claim was also manifestly different from its co-defendants: VimpelCom, as the vendor of the assets, was at the centre of all of the dealings of all the parties to the litigation. The jurisprudence is clear that VimpelCom's costs must be assessed in a manner that reflects the work it needed to complete in order to defend itself.⁸

25. The complexity of the litigation is illustrated by the motion itself:

- (a) 20 volumes of motion records were filed from prior and related proceedings;
- (b) 7 facta totalling over 200 pages were served;
- (c) four days of hearings were held on the motion; and
- (d) 13 gowned lawyers as well as in-house counsel were in attendance.

Rule 57.01(d) – importance of the issues

26. The costs sought by VimpelCom relate to the final disposition of billion-dollar litigation. The matter was obviously of paramount importance to all parties — Catalyst in making the claim and VimpelCom in defending it.

⁸ *Goodyear Canada Inc. v. American International Companies*, 2012 ONSC 5712, at para 22 (Tab 12).

Rule 57.01 (e) and (f) – unnecessary and vexatious proceedings

27. Catalyst’s action was dismissed as an abuse of process. The court specifically found that Catalyst was attempting to re-litigate the Moyse Action:

I disagree with Catalyst’s submission that this new action is ‘not an attempt to impose a new legal theory of wrongdoing on the same facts’. In my view, that is exactly what Catalyst is attempting to do in this proceeding.⁹

28. Moreover, Justice Hailey observed that allowing the action to proceed would “impeach the integrity of the judicial system.”¹⁰

29. In these circumstances, there can be no other conclusion than that the action was unnecessary and vexatious. VimpelCom’s claim for substantial indemnity costs is reasonable in the circumstances and justified given Catalyst’s abusive conduct.

PART IV - ORDER REQUESTED

30. VimpelCom seeks an order awarding substantial indemnity costs for this motion and the action of \$750,284.22 all-inclusive. In the alternative, VimpelCom seeks an order awarding partial indemnity costs for this motion and the action of \$509,275.05 all-inclusive.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2018.



NORTON ROSE FULBRIGHT CANADA LLP
Lawyers for VimpelCom Ltd.

⁹ *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471, at para 64, per Hailey J (Tab 13).

¹⁰ *Ibid.*, para 88 (Tab 13).

Schedule "A"

Court File No.: CV-16-11595-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC.,
TENNEBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP,
LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS
COMMUNICATIONS INC., WEST FACE CAPITAL INC. and MID-BOWLINE GROUP CORP.

Defendants

**BILL OF COSTS OF THE DEFENDANT
VIMPELCOM LTD.**

SUMMARY OF AMOUNTS CLAIMED FOR FEES AND DISBURSEMENTS

	PARTIAL	SUBSTANTIAL	ACTUAL
Fees (as detailed in Part I below)	\$426,564.90	\$639,847.35	\$803,822.20
Disbursements (as detailed in Part II below)	\$24,126.74	\$24,126.74	\$24,126.74
Taxes (13%)	\$58,583.41	\$86,310.13	\$107,626.86
TOTAL:	<u>\$509,275.05</u>	<u>\$750,284.22</u>	<u>\$935,575.80</u>

PART I – FEES

A Action

1. Correspondence, Strategic Review, Fact Investigation, Document Review, Witness Meetings

- Various communications with client. Reviewing plaintiff's pleadings. Various communications with counsel. File strategy and review of background materials.

- Collection of documents and document review. Research. Preparing Statement of Defence. Meetings with material witnesses. Multiple chambers attendances. Attending to motion to transfer matter to Commercial List.

Lawyer	Time			Rate		
	2016	2017	2018	Partial	Substantial	Actual
Pasparakis, Orestes	130	61	2.8	\$81,396.00	\$122,094.00	\$202,005.00
Agarwal, Rahool	136.4	11.8	10.6	\$55,580.00	\$83,370.00	\$84,525.00
Bookman, Michael	364.2	172.7	16.9	\$117,405.60	\$176,108.40	\$181,346.00
Hagglund, Lisa	43.2	17.7	0	\$5,785.50	\$8,678.25	\$16,199.40
Pooransingh, Rachel	0	41.4	0	\$3,105.00	\$4,657.50	\$5,920.20
CATEGORY SUBTOTAL				\$263,272.10	\$394,908.15	\$489,995.60
TOTAL FEES CLAIMED				<u>\$263,272.10</u>	<u>\$394,908.15</u>	<u>\$489,995.60</u>

B Motion To Dismiss

1. Preparing Motion Materials

- Preparing Notice of Motion. Receipt and review of Notices of Motion of co-defendants.
- Preparing Affidavit in support of motion.
- Receiving and reviewing plaintiff's responding motion materials. Receiving and reviewing co-defendants' motion materials. Various correspondence.
- Attending at cross-examinations. Reviewing answers to undertakings.

Lawyer	Time		Rate		
	2016	2017	Partial	Substantial	Actual
Pasparakis, Orestes	6.4	2	\$3,528.00	\$5,292.00	\$8,698.00
Agarwal, Rahool	10	0.2	\$3,570.00	\$5,355.00	\$5,362.00
Bookman, Michael	8.1	25.5	\$7,123.20	\$10,684.80	\$11,262.00
CATEGORY SUBTOTAL			\$14,221.20	\$21,331.80	\$25,322.00
RUNNING SUBTOTAL			\$14,221.20	\$21,331.80	\$25,322.00

2. Preparing Factum

Research for Factum. Reviewing evidence for Factum. Preparing Factum. Various correspondence.

Lawyer	Time		Rate		
	2016	2017	Partial	Substantial	Actual
Pasparakis, Orestes	0	43.4	\$18,228.00	\$27,342.00	\$47,089.00
Agarwal, Rahool	0	93.8	\$32,830.00	\$49,245.00	\$52,528.00
Bookman, Michael	1.9	230.5	\$49,268.80	\$73,903.20	\$78,978.00
Pooransingh, Rachel	0	4.2	\$315.00	\$472.50	\$600.60
Student-At-Law	0	142.8	\$10,710.00	\$16,065.00	\$27,132.00
CATEGORY SUBTOTAL			\$111,351.80	\$167,027.70	\$206,327.60
RUNNING SUBTOTAL			\$125,573.00	\$188,359.50	\$231,649.60

3. Preparing for Motion

Preparing for and attendance at motion.

Lawyer	Time	Rate		
	2017	Partial	Substantial	Actual
Pasparakis, Orestes	42.7	\$17,934.00	\$26,901.00	\$46,329.50
Agarwal, Rahool	25	\$8,750.00	\$13,125.00	\$14,000.00
Bookman, Michael	19.4	\$4,112.80	\$6,169.20	\$6,596.00
CATEGORY SUBTOTAL		\$30,796.80	\$46,195.20	\$66,925.50
RUNNING SUBTOTAL		\$156,369.80	\$234,554.70	\$298,575.10

4. Supplemental Motion Hearing

Preparing written submissions. Receiving and reviewing written submissions. Preparing for and attendance at supplemental motion hearing. Various correspondence.

Lawyer	Time	Rate		
	2018	Partial	Substantial	Actual
Pasparakis, Orestes	8	\$3,360.00	\$5,040.00	\$9,200.00
Agarwal, Rahool	1.7	\$595.00	\$892.50	\$1,011.50
Bookman, Michael	14	\$2,968.00	\$4,452.00	\$5,040.00
Pooransingh, Rachel	4	\$300.00	\$450.00	\$700.00
CATEGORY SUBTOTAL		\$6,923.00	\$10,384.50	\$15,251.50

Lawyer	Time	Rate		
	2018	Partial	Substantial	Actual
TOTAL FEES CLAIMED		<u>\$163,292.80</u>	<u>\$244,939.20</u>	<u>\$313,826.60</u>

PART II – DISBURSEMENTS

A Action

TARIFF A	DESCRIPTION	AMOUNT
23.	For service or attempted service of a document <i>Facsimile (\$265)</i> <i>Courier (\$315.36)</i> <i>Process Service (\$174)</i>	\$754.36
35.	Other disbursements reasonably necessary for the conduct of the proceeding <i>LSUC Levy (\$50.00)</i> <i>Photocopies (\$2,030.25)</i> <i>Airfare (\$10,340.29)</i> <i>Hotel Accommodations (\$3,061.37)</i> <i>Taxis (\$441.44)</i> <i>Travel Expenses (\$32.14)</i> <i>Meals-restaurants (Canada) (\$57.43)</i> <i>Meals - outside of Canada (\$238.59)</i> <i>Document Production (\$194.00)</i> <i>Incidental Expenses / Other (\$327.88)</i>	\$16,773.39
TOTAL NON-TAXABLE DISBURSEMENTS		<u>\$50.00</u>
TOTAL TAXABLE DISBURSEMENTS		<u>\$17,477.75</u>

B Motion to Dismiss

TARIFF A	DESCRIPTION	AMOUNT
23.	For service or attempted service of a document <i>Process Service</i>	\$55.00
31.	Other disbursements reasonably necessary for the conduct of the proceeding <i>Photocopies (\$1,455.25)</i> <i>Research (\$4,611.54)</i> <i>Litigation Search / Search Fees (\$477.20)</i>	\$6,543.99
TOTAL NON-TAXABLE DISBURSEMENTS		<u>Nil</u>
TOTAL TAXABLE DISBURSEMENTS		<u>\$6,598.99</u>

STATEMENT OF EXPERIENCE

A claim for fees is being made with respect to the following lawyers:

Name of Lawyer / Law Clerk	Year of Call	Partial*	Substantial	Actual		
				2016	2017	2018
Pasparakis, Orestes	1995	\$420.00	\$630.00	\$1,020.00	1,085.00	1,150.00
Agarwal, Rahool	2007	\$350.00	\$525.00	\$525.00	\$560.00	\$595.00
Bookman, Michael	2013	\$212.00	\$318.00	\$320.00	\$340.00	\$360.00
Hagglund, Lisa	Law Clerk	\$95.00	\$142.50	\$266.00	\$266.00	N/A
Pooransingh, Rachel	Law Clerk	\$75.00	\$112.50	N/A	\$143.00	\$175.00
Student-At-Law	Student	\$75.00	\$112.50	\$190.00	\$190.00	\$200.00

*adjusted according to Bank of Canada's inflation calculator

THE CATALYST CAPITAL GROUP INC. VIMPELCOM LTD. *et al.*
Plaintiff and Defendants

Court File No.: CV-16-11595-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at TORONTO

**BILL OF COSTS OF THE DEFENDANT
VIMPELCOM LTD.**

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Lawyers for the Defendant, VimpelCom Ltd.

**Schedule “B”
List of Authorities**

TAB	DOCUMENT
1	<i>Catalyst Capital Group Inc. v. Moyse</i> , 2016 ONSC 5271
2	<i>Catalyst Capital Group Inc. v. Moyse</i> , 2018 ONCA 283
3	<i>Re Mid-Bowline Group Corp.</i> , 2016 ONSC 669
4	<i>Daniels v. Crosfield Canada Inc.</i> , (1994) 19 O.R. (3d) 430
5	<i>Boucher v. Public Accountants Council for the Province of Ontario (2002)</i> , 166 O.A.C. 281
6	<i>Zesta Engineering Ltd. v. Cloutier</i> , [2002] O.J. No. 4495
7	<i>Moon v. Sher</i> , [2004] O.J. No. 4651
8	<i>Toronto and Region Conservation Authority v. Gadzala</i> , [2006] OJ No 3188
9	<i>Bergmann v Amis Estate</i> , 2010 ONSC 962
10	<i>Fairview Donut Inc. v the TDL Group Corp</i> , 2014 ONSC 776
11	<i>Catalyst Capital Group Inc. v. Moyse</i> , 2016 ONSC 6285
12	<i>Goodyear Canada Inc. v. American International Companies</i> , 2012 ONSC 5712
13	<i>Catalyst Capital Group Inc. v. VimpelCom Ltd.</i> , 2018 ONSC 2471

**Schedule “C”
Relevant Statutes**

Courts of Justice Act, R.S.O. 1990

131 (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

Rules of Civil Procedure, RRO 1990, Reg. 194.

57.01 (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding,
or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.